THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***11th January 2021*** Signature: _____

CASE NO: 1352/2017

DATE: 11th MARCH 2021

In the matter between:

MASHININI, NOMGQIBELO NELLY Plaintiff

and

THE MEMBER OF THE EXECUTIVE COMMITTEE FOR HEALTH, GAUTENG PROVINCE Defendant

Coram: Adams J

Heard: 11 March 2021 – The 'virtual hearing' of this application for leave to appeal was conducted as a videoconference on the *Microsoft Teams* digital platform.

Delivered: 11 March 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 15H00 on 11 March 2021.

Summary: Application for leave to appeal against the factual and legal findings by a civil trial court and its quantification of the plaintiff's general damages – also against an order that plaintiff should receive Public Health Care as against payment *in lieu* of future medical expenses – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an appellant now faces a higher and a more stringent threshold – application for leave to appeal granted in part –

ORDER

---

(1) The plaintiff is granted leave to appeal against that portion of the judgment and order dated 25 January 2021, which relates to 'the Public Healthcare Defence', that being that the plaintiff, instead of being paid damages in respect of future surgical costs and treatment (R879 314), be rendered / provided such services and treatment by the defendant at the Charlotte Maxeke Johannesburg Academic Hospital.

(2) Leave to appeal is granted to the Supreme Court of Appeal.

(3) The costs of this application for leave to appeal shall be costs in the appeal.

(4) The plaintiff's application for leave to appeal against that portion of the judgment and the order dated the 25 January 2021 relating to 'the quantification of general damages', that being that the plaintiff be paid R450 000 in respect of her claim for general damages, is dismissed with costs.

JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

Adams J:

[1]. I shall refer to the parties as referred to in the main action. The plaintiff is the applicant in this application for leave to appeal and the respondent herein is

the defendant in the action. The plaintiff applies for leave to appeal against the factual and legal findings and conclusions of those parts of the judgment and the order, which I granted on 25 January 2021, relating to: (1) the 'public healthcare defence' successfully raised by the defendant in respect of certain of the future hospital and medical expenses claimed by the plaintiff, and (2) the quantification of the general damages in an amount of R450 000. As stated by the plaintiff in her notice of application for leave to appeal, leave to appeal is sought against:

'2.1 All the factual and legal findings / conclusions of the order and judgment in respect of: "the public healthcare defence", being that the plaintiff, instead of being paid damages in respect of future surgical costs and treatment (R879 314), be rendered / provided such services and treatment by the defendant at the Charlotte Maxeke Johannesburg Academic Hospital;

2.2 All the factual and legal findings / conclusions of the order and judgment in respect of: "the quantification of general damages" being that the plaintiff be paid R450 000 in respect of the claim for general damages.'

[2]. As regards the appeal against my findings relating to the 'Public Healthcare Defence', the plaintiff contends that I erred in finding that the healthcare and medical treatment required by the plaintiff are available at the Charlotte Maxeke Johannesburg Academic Hospital at the same or higher standard than in private healthcare and that that treatment and care should be rendered to the plaintiff by the defendant at the said hospital, instead of being paid to the plaintiff. In making this factual finding, so the plaintiff submits, I had disregarded the absence of evidence on behalf of the defendant in support of the public healthcare defence and the evidence that was tendered by a Professor Bizos that the public healthcare services rendered by the defendant are unsuitable, impractical and/or insufficient for the needs of the plaintiff, as well as other testimony which mitigates against the said defence. The judgment and the order of the court *a quo* in respect of the public healthcare defence, so it was furthermore submitted on behalf of the plaintiff, is factually and legally unfounded and misdirected and, in any event, is at variance with a previous order of this court in terms of which the defendant was held 'liable to pay' plaintiff's damages.

[3]. The plaintiff also contends that I misdirected myself in the application of the principles enunciated in *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government* 2020 (2) (SA567) (GJ). I should not have elevated, so the argument goes, *MSM* to a precedent that the common law rule that delictual damages be paid in money has been developed to order compensation in kind where the defendant establishes that medical services of the same or higher standard will be available to the plaintiff in future in the public healthcare system at no or lesser costs than in the private medical care as claimed.

[4]. As for the R450 000 general damages awarded by the court *a quo*, the plaintiff contends that an irregular award was made at substantial variance with the amount of general damages which should have been properly made and founded if regard is had to all of the facts in the matter and previous awards for comparable injuries.

[5]. Nothing new has been raised by the plaintiff in this application for leave to appeal. In my original judgment, I have dealt with most of the issues raised and it is not necessary to repeat those in full. Suffice to restate what I said in my judgment, namely that, if regard is had to the evidence that was before me, I am satisfied that the medical services to be provided by Specialists Surgeons are and will be available to Mrs Mashinini in future in the public healthcare system at no or lesser cost than the cost of the private medical care claimed. As for the award of R450 000 in respect of the plaintiff's general damages, I remain of the view that, all things considered, that award was just and fair to all concerned.

[6]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judge concerned is of the opinion that 'the appeal would have a reasonable prospect of success'.

[7]. In *Mont Chevaux Trust v Tina Goosen,* LCC 14R/2014 (unreported), the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S,* case no: 157/2015 [2016] ZASCA 112 (7 September 2016). In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

[8]. As far as the order relating to the Public Healthcare Defence goes, I am persuaded that the issues raised by the plaintiff in her application for leave to appeal are issues in respect of which another court is likely to reach conclusions different to those reached by me. I am therefore of the view that there are reasonable prospects of another court coming to a different conclusion to the ones reached by me. The appeal against that portion of my judgment does, in my view, have a reasonable prospect of success and should therefore succeed.

[9]. Not so, as far as the quantification of the general damages is concerned. A trial court has a wide discretion when it comes to determining the quantum of general damages. An appeal court will therefore be slow to interfere with an award of a trial court and impose its own subjective quantum. It is trite that an appeal court will only interfere with the trial court's assessment of the appropriate award of general damages where there is a substantial variation and striking disparity between the award made by the trial court and the award which the appeal court would have made.

[10]. I am not persuaded that another court is likely to award an amount different to that awarded by me. I am therefore of the view that the appeal against that

portion of my judgment, which relates to the quantum of the general damages, does not, in my view, have a reasonable prospect of success and should therefore be refused.

[11]. The plaintiff requests that leave to appeal be granted to the Supreme Court of Appeal, because, so she contends, the appeal involves intricate issues implicating constitutional law and the development of the common law. In that regard, s 17(6)(a) of the Superior Courts Act provides as follows:

'(6) (a) If leave is granted under subsection (2)(a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider —

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal.'

[12]. This matter, in my view, falls squarely within the ambit of the proviso in subsection (6)(a)(i) – it involves a 'question of law of importance', that being whether the time has come in the development of our common law to accept the principle that in certain circumstances payment of damages should be made in kind and not in cash in accordance with the 'once-and-for-all rule'. This question, because of its general application, is an important one which is asked in the High Court often. Also ss (6)(a)(ii) finds application in that the administration of justice – especially for victims in medical negligence cases – requires that the appeal be heard by the SCA.

[13]. I therefore intend granting the plaintiff leave to defend to the Supreme Court of Appeal.

Order

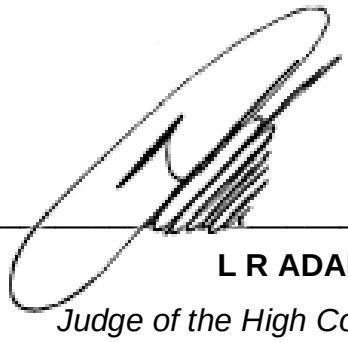
In the circumstances the following order is made:

(1) The plaintiff is granted leave to appeal against that portion of the judgment and order dated 25 January 2021, which relates to 'the Public Healthcare Defence', that being that the plaintiff, instead of being paid damages in respect of future surgical costs and treatment (R879 314), be rendered / provided such services and treatment by the defendant at the Charlotte Maxeke Johannesburg Academic Hospital.

(2) Leave to appeal is granted to the Supreme Court of Appeal.

(3) The costs of this application for leave to appeal shall be costs in the appeal.

(4) The plaintiff's application for leave to appeal against that portion of the judgment and the order dated the 25 January 2021 relating to 'the quantification of general damages', that being that the plaintiff be paid R450 000 in respect of her claim for general damages, is dismissed with costs.



L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	11th March 2021 – the hearing of this application for leave to appeal proceeded as a 'virtual hearing' in a videoconference on the *Microsoft Teams* digital platform
JUDGMENT DATE:	11th March 2021 – judgment handed down electronically
FOR THE PLAINTIFF:	Mr Piet Uys
INSTRUCTED BY:	Malcolm Lyons & Brivik Incorporated, Rosebank, Johannesburg
FOR THE DEFENDANT:	Advocate N Makopo
INSTRUCTED BY:	The State Attorney, Johannesburg